**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
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| | ) | |
| Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WC Docket No. 17-84 |

# REPLY COMMENTS OF AT&T


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## TABLE OF CONTENTS

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| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
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| | ) | |
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## REPLY COMMENTS OF AT&T

AT&T respectfully submits these reply comments in response to the Commission's Public Notice, dated September 13, 2019, and Order Granting Extension of Time, released November 8, 2019, in the above-captioned matters.[1] The *Public Notice* seeks comment on a Petition for Rulemaking and a Petition for Declaratory Ruling filed by the Wireless Infrastructure Association (WIA) and a Petition for Declaratory Ruling filed by CTIA—The Wireless Association (CTIA).[2]

[1] Public Notice, *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition For Rulemaking, WIA Petition For Declaratory Ruling and CTIA Petition For Declaratory Ruling*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849 (rel. Sept. 13, 2019) ("*Public Notice*"); Order Granting Extension of Time, *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849 (rel. Nov. 8, 2019).

[2] WIA Petition for Rulemaking (filed Aug. 27, 2019) ("WIA Rulemaking Petition"); WIA Petition for Declaratory Ruling (filed Aug. 27, 2019) ("WIA Petition"); CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) ("CTIA Petition").

## INTRODUCTION AND SUMMARY

The comments confirm the need for the Commission to promptly grant these Petitions and clarify its rules implementing Section 6409(a) of the Spectrum Act and Section 224 relating to pole attachments.[3] As the comments show, localities are misinterpreting many aspects of the Commission's rules, which is unnecessarily slowing the deployment of 5G. Municipalities, for their part, uniformly oppose the Petitions, claiming that (1) they are not misapplying the rules, (2) the Commission has no authority to issue a declaratory ruling, and (3) the clarifications the Petitioners seek would place onerous burdens on them. Electric utilities also make various legal and practical arguments against CTIA's Petition seeking clarifications under Section 224. None of these objections has merit.

First, the comments build an extensive record documenting that localities are in fact applying overly restrictive interpretations of the Commission's rules that prevent applicants from processing eligible facilities requests within the Commission's 60-day shot clock. In some cases, localities are treating routine requests as constituting a "substantial change" to the facility, thus rendering the 60-day shot clock inapplicable. In other instances, localities are misapplying the shot clock itself, by (for example) failing to apply a single 60-day shot clock to all relevant authorizations. A wide variety of commenters confirm that they are experiencing the same sorts of issues as those laid out in the Petitions that delay the processing of applications by months or even years. The comments thus overwhelmingly confirm that Commission clarification on these issues is necessary to keep 5G deployment on track.

[3] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, title VI, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) ("Spectrum Act"); 47 U.S.C. § 224.

Second, contrary to the assertions of some municipalities, the Petitions for Declaratory Ruling ask the Commission only to clarify the meaning of rules *as already written*. There is no merit to the assertions that these Petitions require a rule change. The Commission has well-established authority to issue declaratory rulings to resolve controversies such as these and to clarify its rules.[4] As Petitioners themselves note, the Commission has previously issued a number of declaratory rulings to resolve controversies concerning local permitting for the deployment of wireless infrastructure.[5] Here, the comments overwhelmingly confirm that the requested clarifications of Section 6409(a) and Section 224 are fully consistent with—and, indeed, were originally contemplated as the proper interpretations of—the existing rules.

Third, there is no merit to the assertions by some municipalities that the requested clarifications and rule changes would impose onerous or improper burdens on the permitting process. Section 6409(a), by definition, applies only to relatively minor, incremental additions to

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[4] 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."); 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("The Commission is authorized to issue a declaratory ruling 'to terminate a controversy or remove uncertainty,' and there is no question that a declaratory ruling can be a form of adjudication . . . ." (citations omitted)).

[5] *See, e.g.*, Declaratory Ruling and Third Report and Order, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 30 FCC Rcd 9088 (2018) ("*2018 State/Local Infrastructure Order*"); Third Report and Order and Declaratory Ruling, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705 (2018) ("*2018 OMTR/Moratoria Order*"); Declaratory Ruling, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994 (2009) (interpreting the statute's phrase "reasonable period of time"), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

*existing* cell sites—*i.e.*, sites that have already undergone the municipality's full approval process—and only in circumstances in which the incremental addition does not "substantially change the physical dimensions" of the facility. Congress appropriately federalized the approval process for such eligible facility requests, mandating that local authorities "may not deny, and shall approve" such requests, and they must do so within the Commission's 60-day shot clock that has been fully litigated and upheld by the Fourth Circuit. Accordingly, by definition, the eligible facilities requests at issue should typically pose no difficult or novel issues, and the municipalities should be able to structure their processes so that they can conduct their review of all necessary authorizations within 60 days. The municipalities have provided no evidence that the requested clarifications to these rules governing non-substantial changes would interfere with any legitimate local government inquiry or approval process.

## I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO RESOLVE ONGOING DISPUTES ABOUT THE PROPER INTERPRETATION OF SECTION 6409(a).

In Section 6409(a) of the Spectrum Act, Congress mandated that "[n]otwithstanding . . . any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request ["EFR"] for a modification . . . that does not substantially change the physical dimensions of such tower or base station."[6] Despite the general success of Section 6409(a) and the Commission's rules in ensuring that minor modifications are promptly processed and approved, the comments show that CTIA and WIA correctly identified two aspects of the Commission's rules that are being misinterpreted to exclude certain qualifying EFRs from being approved under Section 6409(a). The first set of issues arise from municipalities that have adopted

[6] 47 U.S.C. § 1455(a)(1); *see* 47 C.F.R. § 1.6100(c) ("A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.").

overly broad interpretations of a "substantial change" to deny EFRs the protections of Section 6409(a); the second set arises from attempts to interpret the 60-day shot clock to undermine its operation altogether. AT&T agrees that the Commission should clarify these rules to facilitate prompt and efficient approval of qualifying modifications under Section 6409(a).

### A. The Commission Should Clarify When a Modification Constitutes a "Substantial Change."

A number of commenters report disputes with municipalities over what collocations are covered by Section 6409(a) and thus support clarifying when a modification is a "substantial change" under Section 6409(a).[7] Specifically, to ensure that minor modifications are processed under Section 6409(a) as Congress and the Commission intended, the Commission should clarify the narrow scope of the "concealment element" and "equipment cabinet" exceptions, as well as confirm that the term "base station" does not change when evaluating a substantial change to its physical dimensions.

#### 1. Concealment Elements.

The Commission's rules treat a modification as a "substantial change" if it would "defeat the concealment elements of an eligible support structure."[8] Many commenters agree that local authorities are interpreting this exception too broadly,[9] which "risks swallowing the rule that

[7] *See* Wireless Internet Service Providers Association Comments at 6-8; Nokia Comments at 6-8; Free State Foundation Comments at 3-4; ACT—the App Association Comments at 5-7; ExteNet Comments at 21-23; Competitive Carriers Association Comments at 7-8; American Tower Comments at 8-10; Crown Castle Comments at 8-10; Verizon Comments at 9; T-Mobile Comments at 18-19.

[8] 47 C.F.R. § 1.6100(b)(7)(v).

[9] Crown Castle Comments at 8-10; Competitive Carriers Association Comments at 7; American Tower Comments at 8-10; Nokia Comments at 6; Free State Foundation Comments, Cooper Paper at 3.

eligible facilities requests be approved."[10] A number of commenters thus agree that the Commission should clarify both that (1) "concealment elements" refer only to the "stealth" elements of a structure that *disguise* the structure as something other than a wireless site,[11] and (2) the exception applies only when the modification would *defeat* the concealment elements by, in effect, eliminating the disguise.[12]

Municipalities continue to argue that generic features, such as size, width, or color, are concealment elements within the meaning of the rule.[13] Of course, the Commission's rules already establish which increases in size or width qualify as a "substantial change."[14] Smaller increases in size or width should be treated as presumptively falling within the streamlined approval processes of Section 6409(a).[15] As American Tower notes, increases in size or differences in color would be relevant only when such modifications would defeat some *other* element of the structure

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[10] Competitive Carriers Association Comments at 8.

[11] *See, e.g.*, Crown Castle Comments at 9-10 ("the Commission should make clear that 'concealment elements' are those elements purposefully added to the original structure siting approval to make a wireless tower or base station appear as something different"); Competitive Carriers Association Comments at 7 (concealment elements are only those "tailored to make wireless facilities 'look like some feature other than a wireless tower or base station'" (citation omitted)); American Tower Comments at 9 (concealment elements are "'limited to equipment and materials used *specifically* to conceal the visual impact of a wireless facility'" (citation omitted)).

[12] *See, e.g.*, Crown Castle Comments at 10 ("Commission should clarify that not every change to a concealment element reaches the level of 'defeating' the concealment."); Competitive Carriers Association Comments at 8 (Commission should "confirm that minor changes to concealment elements do not automatically eliminate EFR status and trigger a comprehensive review, so long as the change is consistent with the overall concealment plan and does not materially alter the site appearance").

[13] National Association of Telecommunications Officers and Advisors et al. Comments at 8-10; National League of Cities et al. Comments at 16-19, Western Communities Coalition Comments at 34-35.

[14] *See* 47 C.F.R. § 1.6100(b)(7)(i)-(ii).

[15] *See, e.g.*, Competitive Carriers Association Comments at 8 ("[T]he Commission should confirm that the sizes of facilities cannot be considered concealment elements, given that the Commission already adopted specific, objective size criteria to define what qualifies as an EFR.").

that could be fairly characterized as a concealment element (*i.e.*, some other element that disguises the structure as something other than a wireless facility).[16] However, some municipalities continue to claim that features that do not *conceal* the wireless facility are nonetheless concealment elements.[17] A Commission declaratory ruling is necessary to dispel this confusion.[18]

**2. Equipment Cabinets.**

The Commission's rules also provide that a modification to an eligible support structure is a "substantial change" if it "involves installation of more than the standard number of equipment cabinets for the technology involved, but not to exceed four cabinets."[19] Many commenters agree that the Commission should clarify that (1) "equipment cabinet," for purposes of this rule, refers

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[16] American Tower Comments at 10 ("[P]ermit specifications, such as the size of the [facility,] would not be considered concealment elements for purposes of Section 6409 eligibility, unless there is evidence that such an element is indeed materially connected to wireless facility concealment."); *see, e.g.*, National Association of Telecommunications Officers and Advisors et al. Comments at 9 ("modifications that entail larger facilities that will, for example, be visible over the top of a fence or roof structure would undoubtedly defeat the concealment requirements of the initial deployment," if the fence in fact concealed the facility).

[17] *See, e.g.*, Western Communities Coalition Comments at 34-35; National Association of Telecommunications Officers and Advisors et al. Comments at 9; National League of Cities et al. Comments at 16-18. As the Western Communities Coalition notes (at 31), a federal district court recently held that "adding slightly larger antennas and other equipment covered by a metal cylinder" to the top of a pole defeated a "concealment" element within the meaning of the rule, because the city did not want that pole to stand out as different from other poles that looked like "old-fashioned" poles. *See Bd. of Cty. Comm'rs of Douglas Cty. v. Crown Castle USA, Inc.*, No. 17-3171, 2019 WL 4257109 (D. Colo. Sept. 9, 2019). This case is a good example of the confusion surrounding the concealment element exception. No element of the poles in that case are *concealed*—they are all in plain view as poles—and therefore the concealment element exception could not apply to the installation of modestly larger antennas on such poles that fall short of a "substantial change" on size grounds.

[18] *See* Crown Castle Comments at 9 ("In instances where there is a disagreement as to whether a modification 'defeats concealment,' the 6409 Rules provide little in the way of objective criteria . . . [and w]hen there are divergent perspectives between a local government and an applicant . . . , an applicant is effectively precluded from utilizing Section 6409. As a result, an applicant must choose either to abandon its modification, leave its fate to the courts in litigation, or to follow the jurisdiction's often lengthy discretionary approval process.").

[19] 47 C.F.R. § 1.6100(b)(7)(iii).

only to cabinets that are not attached to the structure, and (2) the four-cabinet limitation applies per application, not cumulatively to the entire structure.[20]

Joint comments from the City of San Diego and other western communities (the "Western Communities Coalition") argue that the term "equipment cabinet" means *any* "container" of telecommunications equipment, no matter where it is placed,[21] but as AT&T explained, the municipalities' reading of the rule ignores both the structure of the rule and common industry usage. Subsections (i) and (ii) of the Rule 1.6100(b)(7) already address modifications that would result in changes in height or width on the pole itself, and therefore subsection (iii), dealing with equipment cabinets, logically applies to cabinets installed on the ground or elsewhere.[22] The Commission itself has referred to equipment cabinets as enclosures that are installed "on the ground," not on a tower.[23] And the industry does not consider remote radio units, tower top amplifiers, and other ancillary equipment on a tower, pole, or structure to be "equipment

[20] *See* Verizon Comments at 9; Nokia Comments at 7-8; T-Mobile Comments at 19-20; Crown Castle Comments at 10-11.

[21] Western Communities Coalition Comments at 42 (relying solely on Newton's Telecom Dictionary).

[22] AT&T Comments at 9; CTIA Petition at 14-15.

[23] Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, ¶ 93 n.252 (2014) ("*2014 Wireless Infrastructure Order*") (referring to "ground-mounted cabinets"); *id.* ¶ 176 ("[T]he Commission observed that the Collocation Agreement similarly construes the mounting of an antenna 'on a tower' to encompass installation of associated equipment cabinets or shelters on the ground."); Notice of Proposed Rulemaking, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 FCC Rcd 14238 ¶ 114 (2013) ("*Infrastructure NPRM*") ("We note that the Collocation Agreement similarly construes the mounting of an antenna 'on a tower' to encompass installation of associated equipment cabinets or shelters on the ground.").

cabinets."[24] The comments thus confirm that Commission clarification is necessary to avoid these sorts of disputes that delay deployment of 5G infrastructure.[25]

**3. Definition of Base Station.**

As CTIA's Petition showed, some municipalities are incorrectly calculating how a modification changes the physical dimensions (such as the height) of a "base station" by focusing on the specific portion of the building where the antennas are installed rather than calculating the change in relation to the building (*i.e.*, the base station) as a whole.[26] The municipalities offer no sound arguments in support of this position. National League of Cities points to the FCC's brief in the Fourth Circuit *Montgomery County* case, in which the agency said that measurements for determining substantiality would be "measured from the dimensions of the tower or base station as originally approved, or as most recently modified with zoning approval prior to enactment of the Spectrum Act."[27] That passage does not speak to the issue here, which is whether the rules define a "base station" as the entire building or only a portion of the building for purposes of that determination. As AT&T explained, a "base station" is defined as "a structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between

[24] *See* AT&T Comments at 9; Crown Castle Comments at 10-11.

[25] Western Communities Coalition argues (at 43 & n.118) that the Commission's discussion of "ground cabinets" in the second clause of subsection (iii) shows that "equipment cabinets" in the first clause includes containers attached to the structure. In fact, the Commission's use of those terms cuts the other way. Reading subsections (i), (ii), *and* (iii) together in context, it is clear that subsections (i) and (ii) deal with modifications that change the height or width of the tower or pole itself, while subsection (iii) sets forth the rule governing the addition of cabinets that are not attached to the structure (specifically, the number of such cabinets for all such modifications in the first clause, and the number and size of such cabinets in certain circumstances in the second clause).

[26] CTIA Petition at 16.

[27] National League of Cities et al. Comments at 15 (citing Brief for Respondents at 15-16, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015), 2015 WL 4456506, at *16).

user equipment and a communications network" (excluding "towers").[28] If providers have installed antennas on a building, the building is the "structure," and thus the "base station," within the meaning of the rule. The definition of this "base station" does not change when a municipality evaluates its physical dimensions. No party has pointed to anything in the rules or the *2014 Wireless Infrastructure Order* suggesting that the "structure" could be a portion of the building, rather than the building itself.

### B. The Commission Should Clarify How the Shot Clock and Its Remedy Operate.

There is broad support among commenters for the Commission to issue declaratory rulings clarifying various aspects of how the 60-day shot clock operates to ensure that Section 6409(a) functions as Congress and the Commission intended.[29] Commenters provide various accounts of problems encountered in different jurisdictions, dispelling arguments that no problems exist.[30] At a minimum, the record reflects significant confusion and disagreement regarding how the shot clock and the deemed granted remedy operate and underscores the need for additional guidance from the Commission. Accordingly, the Commission should grant CTIA's and WIA's Petitions and issue clarifications that: (1) a single shot clock applies to all necessary applications and begins when the requesting provider makes a good-faith effort to submit an EFR; (2) the requesting provider may begin modifying the facility immediately if the locality does not act within the 60-

[28] 47 C.F.R. § 1.6100(b)(1).

[29] Wireless Internet Service Providers Association Comments at 6; Verizon Comments at 8-9; Nokia Comments at 4-5; ACT—the App Association Comments at 6; ExteNet Comments at 21-22; T-Mobile Comments at 11-17; Crown Castle Comments at 5-6, 21; Free State Foundation Comments at 3, accompanying Cooper paper at 3; Competitive Carriers Association Comments at 4-5.

[30] *See* Western Communities Coalition Comments at 4-6; National League of Cities et al. Comments at 26-29.

day shot clock; and (3) a conditional approval violates Section 6409(a) and should be deemed a failure to act.

### 1. The Commission Should Clarify that the 60-Day Shot Clock Applies to All Authorizations and Begins to Run When the Applicant Attempts to Seek Approval.

Two key clarifications—that a single shot clock applies to all authorizations, and that the clock begins to run when the applicant makes a good-faith effort to seek approval—are vital to ensuring that the Section 6409(a) shot clock functions properly. Though municipal commenters object to these clarifications, they provide no legitimate reason why pre-application processes or other requirements should fall outside the Section 6409(a) shot clock or why multiple, overlapping shot clocks should be allowed.[31]

The clarification that a single Section 6409(a) shot clock applies to all necessary authorizations, such as zoning, building, and electric permits, is the same one that the Commission provided in the context of the Section 332 shot clock,[32] and the comments reflect the need for the same clarification in the Section 6409(a) context.[33] National League of Cities argues that the Commission's prior decision to apply the Section 332 shot clock to all authorizations necessary for deployment does not support a similar application of the Section 6409(a) shot clock to all such authorizations because of different statutory language.[34] This is a distinction without a difference because, in both cases, the Commission is interpreting the word "any." Just as the Commission correctly concluded that a single Section 332 shot clock applies to "any request for authorization"

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[31] *See* WIA Petition at 5-6.

[32] *2018 State/Local Infrastructure Order* ¶ 144.

[33] T-Mobile Comments at 13-14; ExteNet Comments at 21-23; Crown Castle Comments at 5; *see also id.* at 21-22 (specifically addressing pre-application procedures).

[34] National League of Cities et al. Comments at 27-29.

and not merely to zoning permit applications,[35] it should conclude that a single Section 6409(a) shot clock applies to "*any* eligible facilities request for a modification" and not merely to zoning approvals.[36]

The comments also demonstrate a need to clarify that the shot clock begins with an applicant's good-faith attempt to seek approval.[37] Although some localities express concern that such a declaratory ruling would allow applicants to submit incomplete applications to start the shot clock,[38] the rules already provide that the shot clock may be tolled when a locality determines that an application is incomplete.[39] Other commenters argue that it may be difficult to determine what constitutes a good-faith effort to submit the application.[40]

To begin with, disputes about when and how the shot clock begins is often caused by a lack of clear guidelines as to how an applicant is supposed to initiate the process necessary for a Section 6409(a) eligible facilities request. Due to these failures, applicants are left to guess at how to initiate the process, leading to disputes about whether the process has been initiated. Indeed, as the record shows, in the current situation, municipalities often receive an application but then

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[35] *2018 State/Local Infrastructure Order* ¶¶ 132-33 (discussing the statutory directive under Section 332(c)(7)(B)(ii) applying to "any request for authorization to place, construct, or modify personal wireless service facilities").

[36] 47 U.S.C. § 1455(a)(1) (emphasis added).

[37] *See* Free State Foundation Comments at 3, accompanying Cooper paper at 3; T-Mobile Comments at 16-17; Crown Castle Comments at 22.

[38] City of Coconut Creek Comments at 1-2; *see* City of Gaithersburg Comments at 2.

[39] *See* 47 C.F.R. § 1.6100(c)(3) (providing for tolling of the timeframe for review "in cases where the reviewing State or local government determines that the application is incomplete"); *2014 Wireless Infrastructure Order* ¶ 217 (explaining that the Section 6409(a) shot clock "may be tolled . . . in cases where the reviewing State or municipality informs the applicant in a timely manner that the application is incomplete).

[40] National Association of Telecommunications Officers and Advisors et al. Comments at 6-7; City of Austin Comments at 6; Communications Workers of America Comments at 2-3; National League of Cities et al. Comments at 25-27; Western Communities Coalition Comments at 6.

bounce it from one department to another, or refuse to start the clock due to its lack of procedures for processing EFRs.[41]

A clarification that the shot clock begins with an applicant's good-faith attempt to seek approval will encourage municipalities to adopt reasonable and clear procedures for applicants seeking to initiate a Section 6409(a) eligible facilities request, thus substantially reducing these types of disputes. Where municipalities fail to adopt such reasonable and clear procedures, however, they should not be heard to complain when the shot clock begins when an applicant has made a good-faith attempt to seek approval. To the extent municipalities purport to be concerned about what constitutes a "good faith effort," they can eliminate any such uncertainty by adopting reasonable and clear procedures. Absent such procedures, the clarification that WIA seeks would at least establish some guideposts in an area rife with disagreement and provide applicants with some tools to seek timely review of their applications when they have done everything they can to submit a complete application and yet a municipality refuses to process it.[42] Accordingly, the Commission should grant WIA's request for declarations making clear that a single shot clock applies to all authorizations needed for a modification, and that the shot clock begins when an applicant makes a good-faith attempt to seek approval, including in processes styled as "pre-application" processes.[43]

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[41] *See* WIA Petition at 8; *see also Bd. of Cty. Comm'rs for Douglas Cty.* 2019 WL 4257109, at *3.

[42] *2018 State/Local Infrastructure Order* ¶ 145 ("[T]he shot clock begins to run when the application is proffered . . . notwithstanding [a] locality's refusal to accept it.").

[43] *See* Crown Castle Comments at 21-22 (specifically addressing pre-application procedures).

### 2. The Commission Should Clarify that the Deemed Granted Remedy Means an Applicant May Proceed Even If the Locality Does Not Timely Issue Related Permits.

The comments confirm the need for a clarification from the Commission that once an application has been deemed granted, the applicant may proceed with the modification even if the locality has not issued other related permits in a timely manner.[44] There is no merit to assertions made by some municipalities that the deemed grant authorizes construction to begin only if the local government fails to seek review within 30 days after an applicant sends a notice of the deemed grant.[45] As AT&T has explained, Chairman Pai (then a Commissioner) noted that the *2014 Wireless Infrastructure Order* "makes clear that an applicant can start building on day 61 if a municipality doesn't act on its application."[46] The relevant rule provides that the deemed grant "become[s] effective" when "the applicant notifies the applicable reviewing authority in writing after the review period has expired . . . that the application has been deemed granted."[47] Accordingly, the Commission should clarify that, once an application is deemed granted by notice under Section 1.6100(c)(4), the applicant may proceed with the modification without waiting for the locality to issue other permits or waiting 30 days to see if the locality will bring a judicial challenge.

Some municipalities argue that such a clarification would harm public safety by allowing modifications without permits based on building codes or other safety requirements.[48] But local

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[44] Free State Foundation Comments, accompanying Cooper paper at 3; Competitive Carriers Association Comments at 5-7; T-Mobile Comments at 11-14; Crown Castle Comments at 5-6.

[45] Western Communities Coalition Comments at 13.

[46] *2014 Wireless Infrastructure Order*, Statement of Commissioner Ajit Pai.

[47] 47 C.F.R. § 1.6100(c)(4).

[48] City of Gaithersburg Comments at 2; National Association of Telecommunications Officers and Advisors et al. Comments at 5-6; National League of Cities et al. Comments at 29-30; City of New

jurisdictions have every opportunity to complete any necessary review and enforce safety requirements—they just have to do so within the 60 days allowed by the regulations.[49] To the extent the underlying objection is that 60 days is not enough time to complete such reviews,[50] the Commission already considered and dealt with such objections when it imposed the 60-day shot clock in the *2014 Wireless Infrastructure Order*.[51] Indeed, the notion that the deemed grant remedy should apply immediately to all authorizations is common sense that follows from the related clarification that the same shot clock applies to all authorizations.[52] The absence of either clarification would undermine the entire regulatory scheme, for it would mean that a municipality could easily circumvent the 60-day limit simply by sitting on any particular permit application that it says is necessary for a modification.

The Commission should further clarify that a denial must (1) be in writing, (2) clearly and specifically make a determination that the request is not covered by Section 6409(a), and (3) include a clear explanation of the reasons for the denial—and that otherwise the shot clock continues to run. As the record and case law show, it is not always clear whether a communication

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York Comments at 2-3; Western Communities Coalition Comments at 17; Communications Workers of America Comments at 1-2.

[49] 47 C.F.R. § 1.6100(c)(2). The same goes for some localities' objection that the clarification would preempt public notice and hearing requirements, or "remove" basic processing requirements such as zoning procedures and public participation in the approval process. *See* City of Coconut Creek Comments at 2; Western Communities Coalition Comments at 23. That the deemed granted remedy should cover all authorizations (much as the shot clock does) would not prevent, preempt, or remove any of these approval procedures—it simply affirms that they too fall within the 60-day shot clock period, and cannot be used to hold up the shot clock.

[50] *See, e.g.*, National Association of Telecommunications Officers and Advisors et al. Comments at 6-7; City of Austin Comments at 4.

[51] *2014 Wireless Infrastructure Order* ¶¶ 205-21, *aff'd*, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[52] AT&T Comments at 15.

from a locality constitutes a final denial of an application.[53] Given that the date of the denial triggers a 30-day period to challenge the decision,[54] it is reasonable that the shot clock should continue to run for an applicant who did not receive a denial in writing (such that the applicant did not know it needed to bring a challenge within 30 days) and who did not receive a denial that contains the reasons for the decision (so that judicial review of the denial is not possible).[55] To the extent some municipalities worry that such a clarification would go beyond the requirements under Section 332,[56] AT&T agrees that it would be reasonable for the Commission's clarification regarding the writing requirements in Section 6409(a) denials to parallel the Section 332 requirements outlined by the Supreme Court in *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808 (2015).[57]

### 3. The Commission Should Clarify that Conditional Approvals Are Improper and Should Be Construed As a Failure to Act.

Conditional approvals are an area where the comments reflect confusion and disagreement, underscoring the need for Commission clarification. As AT&T explained in its opening comments, purported approvals that come attached with conditions are inconsistent with Section 6409(a)'s instruction that localities must approve EFRs "[n]otwithstanding . . . any other provision

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[53] *See* Crown Castle Comments at 26-27; *Board of Cty. Comm'rs for Douglas Cty.*, 2019 WL 4257109, at *4-6.

[54] *2014 Wireless Infrastructure Order* ¶ 236.

[55] *See id.*, Statement of Commissioner Michael O'Rielly ("Is it really too much to ask for a locality to provide written justification for denying an application at the same time it provides the reasons for denying the application? Or for a locality to spell out the exact reasons for a denial? . . . Of course not.").

[56] Western Communities Coalition Comments at 19-23.

[57] AT&T notes that *T-Mobile* nevertheless requires municipalities to provide reasons that are "clear enough to enable judicial review." *T-Mobile*, 135 S. Ct. at 815.

of law,"[58] and any such conditions (other than those involving health and safety requirements) should be deemed a failure to act, or alternatively, deemed void.[59] As the comments illustrate, it is not clear whether a conditional approval would constitute a failure to act, an approval with void conditions, or whether it is a denial that gives rise to a judicial claim that must be filed within 30 days.[60]

Opposing commenters offer no legitimate reason why the Commission should not clarify these issues. Commenters who argue that Section 6409(a) "does not require local governments to *unconditionally* approve EFRs"[61] ignore the statutory directive to approve all EFRs. Moreover, the requested clarification would not prevent municipalities from conditioning approval on generally applicable health and safety requirements, which the Commission has allowed.[62] Given that conditional approvals could undermine the entire 60-day scheme, the Commission should clarify that conditional approvals other than those pertaining to generally applicable health and safety requirements are improper, and clarify that they constitute a failure to act for the purpose of the deemed granted remedy.

## II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT SECTION 224 APPLIES TO LIGHT POLES AND DOES NOT ALLOW BLANKET PROHIBITIONS ON INSTALLING WIRELESS EQUIPMENT.

The comments confirm that carriers and others that work to deploy communications infrastructure face significant hurdles to deploying 5G based on electric utilities' unwarranted

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[58] 47 U.S.C. § 1455(a)(1).

[59] AT&T Comments at 16-17; *see also* Crown Castle Comments at 6; T-Mobile Comments at 14-15; Free State Foundation Comments at 3, accompanying Cooper paper at 3.

[60] Crown Castle Comments at 6; T-Mobile Comments at 14-15; *see* Western Communities Coalition Comments at 61 (arguing that conditional approvals are not tantamount to a denial).

[61] Western Communities Coalition Comments at 61.

[62] *See 2014 Wireless Infrastructure Order* ¶ 202.

exemption of light poles from the pole attachment requirements and their refusal to follow the Commission's requirements that denial of access to poles must not be based on blanket prohibitions devoid of specific reasons.[63] Given these problems and the confusion in the record regarding the scope of Section 224 and its requirements, the Commission should issue declaratory rulings to provide clarity on these issues.

### A. The Commission Should Clarify that Light Poles Are Not Exempted from "Poles" Covered By Section 224 and Utilities Must Provide Reasonable, Non-Discriminatory Access to Such Poles.

The comments confirm that access to existing local infrastructure such as light poles is extremely important to the speed and success of 5G deployment.[64] Light poles, which already line many rights-of-way and are separated at distances ideal for the smaller propagation of 5G cells deployed with millimeter wave spectrum, are key to such deployment.[65] In fact, in many areas—where electric lines are buried underground and no other existing infrastructure is available—light poles may be the only feasible option to deploy small cells.[66] Yet, as made clear from the record, many utilities unjustifiably read an exclusion for light poles into Section 224 and refuse to make them available for attachment of equipment on a non-discriminatory basis, at just and reasonable rates.[67]

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[63] Verizon Comments at 2-7; ACA Connects Comments at 2-6; ACT—the App Association Comments at 10; T-Mobile Comments at 22-24; ExteNet Comments at 4-8; Crown Castle Comments at 38-46.

[64] Verizon Comments at 2-3; ACA Connects Comments at 1-2; ACT—the App Association Comments at 10; T-Mobile Comments at 22; ExteNet Comments at 4-5; Crown Castle Comments at 38.

[65] AT&T Comments at 22 n.69.

[66] CTIA Petition at 21.

[67] Utilities generally concede that utility poles that have streetlights on them are covered by Section 224. *See* Electric Utilities Comments at 5 n.3.

As AT&T and others explained in the opening comments, Section 224 requires utilities to provide access to "any pole" owned or controlled by the utilities: "A utility shall provide a cable television system or any communications carrier with nondiscriminatory access to *any* pole, duct, conduit, or rights-of-way owned or controlled by it."[68] This statutory command could not be clearer: Section 224 "reflects Congress' determination that utilities generally must accommodate requests for access by telecommunications carriers and cable operators,"[69] subject only to the express exceptions in Section 224(f)(2), which allow utilities to deny access where there is "insufficient capacity" or concerns related to "safety, reliability, and generally applicable engineering."[70]

The electric utilities have no answer to the clear language of Section 224(f)(1). Instead, they try to shift the focus to Section 224(a)(1), which defines the term "utility."[71] They argue that Section 224(a)(1) "did not use the word *any*" before the word "pole," which they say is evidence that Congress did not intend to require utilities to provide access to "any" pole.[72] The case law forecloses this interpretation. First, the Supreme Court has made clear that Section 224(a)(1), which is just a definitions section, "concerns only *whose* poles are covered"; it does not address what poles are covered or what those entities are required to do.[73] Those questions are answered

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[68] 47 U.S.C. § 224(f)(2) (emphasis added); *see* 47 C.F.R. § 1.1401 *et seq.*

[69] First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1123 (1996) ("*1996 Local Competition Order*").

[70] 47 U.S.C. § 224(f)(2).

[71] 47 U.S.C. § 224(a)(1).

[72] Utility Association Comments at 7 (emphasis in original).

[73] *See Nat'l Cable & Telecommc'ns Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) ("A 'utility' is defined as an entity 'who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.' § 224(a)(1). The definition, though, concerns only whose poles are covered, not which attachments are covered."). The utilities are incorrect

in Section 224(f)(1), which unambiguously requires utilities to "provide . . . nondiscriminatory access to *any* pole . . . owned or controlled by [them]."[74] Similarly, the Eleventh Circuit has also explicitly rejected the argument that Section 224(a)(1)'s reference to poles that are "used, in whole or in part, for wire communications" limits the scope of a utility's duties under Section 224(f)(1).[75] Indeed, the Eleventh Circuit elegantly stated the full statutory rule: "the text of the Act *clearly* indicates that its coverage extends to *any* of a utility's 'poles, ducts, conduits, or rights of way,' so long as the utility (1) uses *any* of its 'poles, ducts, conduits, or rights-of-way' for wire communications; and (2) the facility does not fall within one of the exceptions indicated in § 224(f)(2)."[76] The utilities are fighting against the plain language of the statute and settled precedent.

The electric utilities' proposed interpretation would also create internal inconsistencies that require Congress's word choices to be ignored. In particular, the utilities' proposed interpretation of Section 224(a)(1) means that utilities are required to give access only to certain poles, even though Section 224(f)(1) states that the utilities "shall" provide access to "any pole."[77] This

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when they characterize this Supreme Court decision as holding "that Section 224(a)(1) defines the types of utility infrastructure . . . that are covered by the Act." Utility Association Comments at 7. In fact, as noted, the Supreme Court stated that Section 224(a)(1) "concerns only whose poles are covered," *NCTA*, 534 U.S. at 340, and the utilities identify no language in the decision supporting their contrary characterization.

[74] 47 U.S.C. § 224(f)(1) (emphasis added).

[75] *Southern Co. v. FCC*, 293 F.3d 1338, 1349-50 (11th Cir. 2002).

[76] *Id.* (emphasis added). Under the utilities' contrary reading, no new pole erected by a covered utility would be subject to 224(f)(1) until the utility chose to add telecommunications functionality to it, which would undermine the entire purpose of Section 224. *See 1996 Local Competition Order* ¶ 1173 ("We further conclude that use of *any* utility pole, duct, conduit, or right-of-way for wire communications triggers access to *all* poles, ducts, conduits, and rights-of-way owned or controlled by the utility, *including those not currently used for wire communications*." (emphasis added)).

[77] 47 U.S.C. § 224(f)(1).

internal inconsistency can be resolved only by reading the word "any" out of Section 224(f)(1). Basic tenets of statutory construction favor interpretations that are consistent and give meaning to all of the words of the statute over those that do not.[78]

The utilities also argue that the Eleventh Circuit held in *Southern Company* that utilities are required to give access only to poles associated with their local (electric) distribution networks.[79] That is incorrect.[80] In *Southern Company*, the court was asked whether the Commission correctly concluded that Section 224 applied to *interstate* transmission towers. The court differentiated local distribution networks from interstate transmission towers and, based on this distinction, rejected the Commission's conclusion. The Eleventh Circuit was not asked and did not find that Section 224 does not apply to light poles or other types of poles; to the contrary, the Eleventh Circuit acknowledged that the statute expressly applies to "any" utility-owned or controlled pole not covered by Section 224(f)(2)'s explicit exceptions.[81]

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[78] *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statutes should be read "to give effect, if possible, to every clause and word").

[79] POWER Coalition Comments at 4-6; Electric Utilities Comments at 7-9; Coalition of Concerned Utilities Comments at 9-11.

[80] Verizon Comments at 3-6, ACA Connects Comments at 2-4; ACT—the App Association Comments at 10; T-Mobile Comments at 22-23; ExteNet Comments at 5-7; Crown Castle Comments at 38-46.

[81] The utilities' attempt to use references to "utility poles" in the legislative history to buttress their erroneous reading of Section 224 also fails. *See* Electric Utilities Comments at 5; Utility Associations Comments at 6. As discussed above, the statutory text is clear that Section 224 applies to any pole and contains no categorical carve-out for any types of poles. In such circumstances, the Supreme Court has explained that it "will not . . . allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."). To the extent that some utilities argue that Congress's concerns of unequal bargaining power are inapplicable in this context, *see* Utility Associations Comments at 6, that is also incorrect. Though there are other light pole owners besides utilities, the issue of unequal bargaining power remains because there is typically only one set of light poles along any street or other right-of-way. Especially where light poles are the only

The utilities also raise various alleged practical concerns, but none provides a basis for denying CTIA's Petition. To the extent there are valid reasons for not permitting access to a particular light pole, Section 224(f)(2) and its implementing rules permit the utility to deny access on those grounds.[82] For example, where a particular attachment would not be possible on a light pole without violating the National Electrical Safety Code,[83] the utility could lawfully deny access to that pole, on a non-discriminatory basis, "for reasons of safety [and] reliability."[84] On any number of issues that the utilities raise—for example, that accommodating equipment on light poles would require them to replace light poles and install new foundation or additional power sources, or that it would be impermissible under customer agreements or municipal laws[85]—they can still deny access for reasons of insufficient capacity, or safety and engineering issues.[86] The

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option because other facilities are buried underground, *see* CTIA Petition at 21, the owners of those light poles control a unique set of infrastructure and can exert significant bargaining power to extract unreasonable conditions from carriers who need pole attachments. Evidence of such terms abounds in the record. *See, e.g.*, AT&T Comments at 22-23 (describing a utility in Florida that allows AT&T access to light poles only if AT&T will install and donate dark fiber to the utility's poles).

[82] 47 U.S.C. § 224(f)(2); 47 C.F.R. § 1.1403(a) ("[A] utility may deny . . . access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."); *see also 1996 Local Competition Order* ¶ 1123.

[83] Coalition of Concerned Utilities Comments at 13.

[84] 47 U.S.C. § 224(f)(2); *see* 47 C.F.R. § 1.1403(a).

[85] *See* POWER Coalition Comments at 9-10; Xcel Energy Comments at 7; Coalition of Concerned Utilities Comments at 12-16, 20. Similarly, a number of municipal organizations commented that they have agreements with utilities as well as municipal laws and regulations concerning light poles. *See* City of Chesapeake Beach Comments at 2; City of Frederick Comments at 2; Town of Kensington Comments at 2; Maryland Municipal League Comments at 2; City of Aberdeen Comments at 2; Chevy Chase Village Comments at 2; City of Takoma Park Comments at 2; National Association of Telecommunications Officers and Advisors et al. Comments at 14. To the extent these agreements and regulations pertain to generally applicable safety and engineering purposes, *see* 47 U.S.C. § 224(f)(2), there would not be a conflict.

[86] *See* 47 U.S.C. § 224(f)(2); 47 C.F.R. § 1.1403(a).

presence of any of these conditions on light pole attachment requests does not mean the pole is not covered by Section 224, and comments from electric utilities to the contrary ignore those light poles and attachments where these conditions will not exist. The clarification sought by CTIA would simply ensure a baseline level of non-discriminatory access to light poles at just and reasonable rates, not mandate attachments to all light poles in all circumstances.

To the extent that utilities express concern about the determination of pole attachment rates for light poles, this too is no impediment to granting the Petition. The utilities note that the Commission's current rate formula relies on certain FERC accounts that are not about light poles.[87] Even if true, that fact would not bar the requested clarification. The statute clearly applies to light poles, and utilities can apply the existing rates to light pole attachments. Pole attachment rates have always been based on averages—they are not priced differently on a pole-by-pole basis—and the existing rates, even to the extent they do not specifically incorporate light pole costs, can be reasonably applied to light pole attachments.

### B. The Commission Should Clarify that Blanket Prohibitions on Access Are Not Allowed to Any Portions of Poles and that Utilities Must Give Specific Reasons for Denial of Access.

The record shows that electric utilities impose barriers to 5G deployment by imposing blanket prohibitions on attachments, either to entire poles or a section of the pole, without giving specific reasons for such denials.[88] The electric utilities have provided no good reason why the Commission should not clarify that blanket prohibitions are not allowed. Contrary to the electric

[87] POWER Coalition Comments at 10-11; Electric Utilities Comments at 12; Coalition of Concerned Utilities Comments at 21.

[88] Crown Castle Comments at 42-46; Verizon Comments at 6-7; ACA Connects Comments at 4; T-Mobile Comments at 23-24; ExteNet Comments at 7-8.

utilities' claims,[89] CTIA's requested clarification does not conflict with utilities' enforcement of reasonable engineering and safety standards. Instead, the requested clarification is simply asking electric utilities to conduct a proper evaluation and provide specific reasons based on the specific request and pole. The Commission's rules instruct that "denial of access shall be specific,"[90] and the Commission has repeatedly emphasized that it "is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about the type of attachment or technology, or a generalized citation to Section 224."[91] CTIA's Petition simply asks for a clarification that follows directly from these proclamations: that blanket prohibitions on portions of poles are not permissible under Section 224. Although some electric utilities complain that they must "respond to each application for [attaching] equipment with the same explanation[],"[92] the Commission's rules require utilities to consider access to each pole individually, because such pole-specific consideration may reveal that particular poles are amenable to carrier access.[93]

As to the "unusable space" on poles—which is not unusable at all for certain types of auxiliary equipment needed for 5G—the electric utilities and other commenters argue, contrary to

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[89] Electric Utilities Comments at 17-19; Coalition of Concerned Utilities Comments at 22-23.

[90] 47 C.F.R. § 1.1403(b).

[91] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 ¶ 76 (2011) ("*2011 Pole Attachments Order*") (affirming that "a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue"); *see 2018 OTMR/Moratoria Order* ¶ 134 n.498.

[92] Electric Utilities Comments at 20.

[93] For light poles, in particular, the electric utilities have recognized that they "come in all different shapes, sizes, and materials." POWER Coalition Comments at 9. Just as the electric utilities argued that these "unique and varying dimensions and characteristics of light poles make mandatory access requirements infeasible," *id.*, so too should the varying characteristics of different poles and different equipment be taken into account specifically when a utility considers denying access to a pole or portions of a pole.

the Commission's previous findings,[94] that use of that space would create a safety hazard as a categorical matter.[95] Even assuming that these are all reasonable and legitimate concerns,[96] there is no reason that the requested relief—no blanket prohibitions on the unusable space—would prevent any electric utility from articulating these safety concerns and denying access on a pole-by-pole basis pursuant to Section 224(f)(2). That there may be safety concerns with the unusable space on some poles does not justify a blanket prohibition that fails to provide specific reasons based on an evaluation of the particular pole and the particular attachments at issue in the request. The Commission should grant this clarification to reaffirm its requirement that denials of access must be based on specific reasons, no matter what area the blanket prohibition may cover.

## III. THE COMMISSION SHOULD INITIATE A RULEMAKING TO UPDATE ITS RULES TO FURTHER FACILITATE COLLOCATIONS THAT MAKE USE OF EXISTING INFRASTRUCTURE.

There is widespread support among the wireless and Internet service industries for the Commission to commence a rulemaking procedure to consider revising its rules to continue to promote collocations as an effective and least disruptive means of deploying 5G equipment.[97] Given the demonstrated need for such consideration in the context of the race for 5G deployment, the Commission should grant WIA's Petition and consider updates to its rule that would (1) allow

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[94] *2018 OMTR/Moratoria Order* ¶ 134 ("We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.").

[95] POWER Coalition Comments at 16-17; Electric Utilities Comments at 15-17; Utility Associations Comments at 18; Coalition of Concerned Utilities Comments at 23-26.

[96] *See* Crown Castle Comments at 42 (arguing that the safety concerns cited by the utilities are unreasonable and unsupported).

[97] *See* American Tower Comments at 3-8; Crown Castle Comments at 30-38; Wireless Internet Service Providers Association Comments at 8-10; Nokia Comments at 8-10; Competitive Carriers Association Comments at 8-9; ACT—the App Association at 7-10; ExteNet Comments at 21-23; Free State Foundation Comments at 3-4.

collocations requiring a limited expansion of the facility to be covered under Section 6409(a) as long as excavation is limited to within 30 feet of the site, and (2) require fees for processing EFRs to be based on reasonable costs that localities incur in reviewing the applications.[98]

### A. The Commission Should Amend Its Rules to Indicate that a Limited Expansion Is Not a Substantial Change Under Section 6409(a) Unless Excavation Would Occur More Than 30 Feet from the Site Boundary.

AT&T and many others support WIA's request that the Commission consider amending its rules to make clear that limited expansions needed for a collocation would not be a substantial change, and would be covered under Section 6409(a), unless excavation would occur more than 30 feet outside of the site.[99] As the Competitive Carriers Association explained, the current rules that "regard a modification as a *per se* substantial change" when there is any excavation outside of the site "made sense when the industry needed to shift from construction of large new towers to greater collocation on existing towers."[100] But they no longer make sense in the aftermath of successful collocation efforts that have left little room on existing towers, such that minor expansions are necessary for use of many existing towers.[101]

The comments thus confirm that an update is necessary to ensure that Commission policies intended to promote collocations continue to do so. When the Commission last considered this issue, it adopted standards from the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("2001 Collocation Agreement") governing historical preservation

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[98] WIA Rulemaking Petition at 12-13.

[99] American Tower Comments at 3-8; Crown Castle Comments at 30-34; Wireless Internet Service Providers Association Comments at 8; Nokia Comments at 8-9; Competitive Carriers Association Comments at 8-9; ACT—the App Association at 7-10; ExteNet Comments at 21.

[100] Competitive Carriers Association Comments at 8-9.

[101] *Id.*; AT&T Comments at 30.

reviews.[102] The Commission should consider updating its approach, perhaps by borrowing from the more recent 2005 Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("2005 NPA"),[103] or even exploring solutions to these new problems that may not hew precisely to the historical preservation standards.

Commenters who oppose the requested rulemaking do not dispute the changed circumstances or the need for the Commission to revisit these policies to see if they properly promote collocation as intended. Instead, much of the opposition to the requested rulemaking appears to stem from a misunderstanding of WIA's request as allowing the site itself to be expanded up to 30 feet, rather than simply excavation outside of the site, as non-substantial change.[104] To the extent that there are valid concerns about the effects of the proposed changes to the wording of the rules, these concerns should be hashed out in the rulemaking process. The diversity of views and proposed solutions reflected in the comments[105] show the need for further discussion in the context of a rulemaking, which can explore alternative approaches to revising the regulatory language.[106]

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[102] *2014 Wireless Infrastructure Order* ¶ 198; *see* 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("2001 Collocation Agreement").

[103] 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("2005 NPA"), § III.B.

[104] City of Austin Comments at 5; Western Communities Coalition Comments at 51-53; National Association of Telecommunications Officers and Advisors et al. Comments at 14; National League of Cities et al. Comments at 13.

[105] For example, American Tower and Crown Castle suggest that *site expansions* of 30 feet or less should not be considered substantial changes. American Tower Corporation Comments at 5 n.10; Crown Castle Comments at 34; *see also* ACT—the App Association Comments at 7-8.

[106] AT&T Comments at 31 (positing an alternative approach that would modify the excavation aspect of its "substantial change" definition under Section 1.6100(b)(7)(iv)).

### B. The Commission Should Amend Its Rules to Require that Fees for Processing EFRs Must Be Cost-Based, and that Failure to Pay Disputed Fees Is Not a Valid Basis for Refusing to Process an EFR Application.

Many commenters also support a rulemaking to require processing fees for EFRs to be cost-based and to provide that disputes over fees cannot be used to refuse to process an EFR application.[107] As the Wireless Internet Service Providers Association pointed out, the Commission had previously cited the "limited record of problems implementing the provision" in declining to adopt any provisions regarding fees under 6409(a),[108] but there is now a record demonstrating precisely such problems with fees imposed by localities.[109] Just as it did in the parallel context of Section 332 last year, the Commission should consider a rule requiring any fees to be cost-based.[110]

Some localities oppose a rulemaking on the basis that their fees are already cost-based.[111] But if their current practices are already compliant with the proposed rule, any rule imposing such a requirement should not pose any problems.[112] Other concerns raised by commenters—for

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[107] Wireless Internet Service Providers Association Comments at 8-10; Nokia Comments at 9-10; Free State Foundation Comments at 3-4; ExteNet Comments at 22-23; Crown Castle Comments at 34-38.

[108] *2014 Wireless Infrastructure Order* ¶ 221.

[109] Wireless Internet Service Providers Association Comments at 9-10 (also providing examples); *see* Crown Castle Comments at 35.

[110] *2018 State/Local Infrastructure Order* ¶¶ 50, 74; *see* ExteNet Comments at 23 n.70 ("[L]ocalities should not be permitted to do under Section 6409(a) what they are not permitted to do under Section 332 . . . ."); Crown Castle Comments at 35 ("The silence of the Commission on fees for collocation and minor modifications under Section 6409 stands in stark contrast to the Commission's clear guidance for fees under Section 253 and 332(c)(7) in the September Order.").

[111] National League of Cities et al. Comments at 21-23; Western Communities Coalition Comments at 89-90.

[112] Similarly, to the extent that some municipal commenters argue that their requirements of deposits and escrows are reasonable and only used for costs related to their review, *see* National League of Cities et al. Comments at 23, a rule to that effect—stating that any escrow or deposit

example, that the fees outlined in the *2018 State/Local Infrastructure Order* should not be applied to Section 6409(a)[113]—are arguments about what the rule should say that are best taken up in a rulemaking process, and are not reasons to deny the request for rulemaking.[114] Accordingly, AT&T supports WIA's request for a rulemaking on these two issues.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in AT&T's opening comments, the Commission should grant the Petitions in the manner described herein.

Respectfully submitted,

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fees should only be used for review that is reasonably related to determining whether the request is covered by Section 6409(a)—should not affect them. *See* AT&T Comments at 33 n.112.

[113] City of Austin Comments at 5; National League of Cities et al. Comments at 24.

[114] The same goes for comments that posit that some version of any future adopted rule could be abused. *See* National Association of Telecommunications Officers and Advisors et al. Comments at 16; National League of Cities et al. Comments at 22.